

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JESSE H. NICHOLSON, JR.,)
)
 Plaintiff,)
)
 v.) Civil Action No. 00-588-SLR
)
ROBERT SNYDER, WARDEN;)
JOSEPH DUDLEK, STAFF LT. and)
JANICE HENRY, CPT.,)
)
 Defendants.)

MEMORANDUM ORDER

I. BACKGROUND

On June 19, 2000, plaintiff Jesse H. Nicholson filed this 42 U.S.C. § 1983 action alleging that his Constitutional rights were violated when he was terminated from his prison job after testing positive for marijuana use. (D.I. 1) He later amended his complaint to include allegations of retaliatory conduct by defendants Dudlek and Henry. (D.I. 11)

On August 10, 2001, the court granted in part and denied in part defendants' motion for summary judgment.¹ (D.I. 49, 50) Plaintiff moved for reconsideration (D.I. 51) and filed an appeal with the United States Court of Appeals for the Third Circuit. (D.I. 53)

¹Specifically, the complaint against defendant Snyder was dismissed in its entirety. (D.I. 49) Plaintiff's Fifth, Eighth and Fourteenth Amendment claims against defendants Dudlek and Henry were dismissed. The court ordered that plaintiff was entitled to discovery on the remaining claim, retaliation.

On November 7, 2001, the Third Circuit dismissed plaintiff's appeal. (D.I. 56) Discovery commenced and disputes related thereto continued until April 2, 2002 when plaintiff appealed to the Third Circuit for a second time. (D.I. 59, 60, 63, 65, 68, 69)

On August 29, 2002, this court stayed plaintiff's case pending a decision by the Third Circuit. (D.I. 76) The Court dismissed plaintiff's appeal for lack of jurisdiction on November 8, 2002. (D.I. 78) Plaintiff renewed his motion to amend his complaint on March 26, 2003 (D.I. 82), and defendants renewed their motion for summary judgment. (D.I. 85) Plaintiff then filed: 1) a motion for subpoena duces tecum; 2) a motion for continuance of summary judgment and/to stay defendants renewed summary judgment motion; and 3) for reconsideration. (D.I. 90, 92, 94)

II. DISCUSSION

A. Motion to Amend

Federal Rule of Civil Procedure 15(a) provides for amendment of a complaint to be freely given in the absence of any apparent or stated reason such as undue delay, bad faith, repeated failure to cure deficiencies, undue prejudice or futility of amendment. Foman v. Davis, 371 U.S. 178 (1962); Arab African International Bank v. Epstein, 10 F.3d 168 (3d Cir. 1993). The court finds that amendment in this case would be futile. The Third Circuit

Court of Appeals has defined futile as where "the complaint, as amended, would fail to state a claim upon which relief could be granted." In re NAHC, Inc. Securities Litigation, 306 F.3d 1314, 1332 (3d Cir. 2002); Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 188-189 (3d Cir. 2000) (affirming district court's denial of leave to amend because amendment would include a meritless claim).

Plaintiff's proposed second amended complaint seeks to add previously dismissed defendant Robert Snyder, as well as three "John Doe" defendants, Elizabeth Burris, Deputy Warden II, Larry McGuian, Deputy Warden I, David Hollman, Security Major and Ronald Hosterman, Treatment Administrator. (D.I. 64, 82, 62, 60) Although plaintiff has some new defendants, his proposed amendment restates his aggravation with the loss of his prison job as well as his reclassification. The court previously held that neither Delaware law nor any other authority creates a liberty interest in the right to participate in a work program. See James v. Quinlan, 866 F.2d 627, 629-30 (3d Cir. 1989); (D.I. 49) Similarly, the court has concluded that neither Delaware law nor prison regulations create a liberty interest in a prisoner's classification within an institution. See 11 Del. C. § 6529(e); Hewitt v. Helms, 459 U.S. 460, 466 (1983); Sandin v. Conner, 515 U.S. 472 (1995); Brown v. Cunningham, 730 F. Supp. 612 (D.Del. 1990). Absent the presence of a liberty interest, the Due

Process Clause is not implicated and, therefore, the amendment would be futile.

B. Retaliation

Defendants assert that summary judgement on the only remaining issue, retaliation, is appropriate because plaintiff has failed to present any evidence of retaliatory behavior.

(D.I. 85, 86, 89) Although afforded the opportunity to file opposition, plaintiff has filed a motion for a continuance of summary judgment and/or to stay summary judgment (D.I. 92) and for reconsideration of the court's August 10, 2001 memorandum opinion and order. (D.I. 94; D.I. 50)

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal

citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Prisoners have a constitutional right to be free from retaliation for exercising their constitutional rights. See White v. Napoleon, 897 F.2d 103, 111 (3d Cir. 1990). "The Supreme Court has explicitly held that an individual has a viable claim against the government when he is able to prove that the government took action against him in retaliation for his exercise of First Amendment rights." Anderson v. Davila, 125

F.3d 148, 160 (3d Cir. 1997) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). Retaliation protection extends to complaints for which a person has no independent constitutional right. See Mt. Healthy, 429 U.S. at 283. Thus, even if plaintiff is not entitled to a prison job or a disciplinary hearing, defendants cannot discriminate against him for exercising his First Amendment rights. To state a retaliation claim, plaintiff would have to demonstrate: (1) that he engaged in protected activity; (2) that the defendants responded with retaliation; and (3) that his protected activity was the cause of the retaliation. See Anderson, 125 F.3d at 161.

When the court first considered the retaliation issue over two years ago, defendants had failed to provide discovery and the evidence used to support their motion for summary judgment was inclusive. Since then, however, extensive discovery has been exchanged. (D.I. 57, 59, 61, 63, 65, 68, 69, 71, 83, 90, 91) After a thorough review of all pertinent documents, the court finds plaintiff has failed to present any evidence to establish that defendants' conduct was related to his instituting this lawsuit. Although plaintiff urges the court to defer consideration of the motion and to reconsider its previous rulings, there has been nothing presented to suggest that defendants' conduct infringed upon plaintiff's constitutional

rights and the mere passage of time will not have a contrary effect.

III. CONCLUSION

At Wilmington this 30th day of September, 2003,

IT IS ORDERED that:

1. Plaintiff's motion to amend (D.I. 82) is **denied**.
2. Defendants' motion for summary judgment is **granted**. (D.I. 85)
3. Defendants' motion to lift stay is **granted**. (D.I. 87)
4. Plaintiff's motion for subpoena duces tecum is **denied** as moot. (D.I. 90)
5. Plaintiff's motion for a continuance of summary judgment is **denied**. (D.I. 92-1)
6. Plaintiff's motion to stay is **denied**. (D.I. 92-2)
7. Plaintiff's motion for reconsideration of the court's August, 2001 order is denied.
8. The Clerk of Court is ordered to enter judgment in favor of defendants and against plaintiff.

Sue L. Robinson
United States District Judge